No. 13390

United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

R. D. MERRILL,

Appellee.

Transcript of Record

Appeal from the United States District Court Western District of Washington, Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—10-6-52

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the Western District of Washington, Northern Division.

File No. 2418

R. D. MERRILL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

FIRST CAUSE OF ACTION

1. The jurisdiction of this Court herein arises under Title 28, United States Code, Section 1346 (a) (1), in that it is a civil action against the United States to recover excessive sums totalling less than $10,000 illegally assessed and collected under the internal revenue laws of the United States.

2. At all times herein referred to, plaintiff was, and he now is, a resident of Seattle, King County, Washington, within the Northern Division of the Western District of Washington.

3. During the year 1940, plaintiff duly filed with the Collector of Internal Revenue of the United States for the District of Washington and Alaska, his income tax return for the year 1939 and paid on account of the tax liability thereon to the said Collector the sum of $2,839.07 during the said year.

4. Thereafter upon a Revenue Agent's Report issued in connection with an examination of the aforesaid return on May 27, 1942, plaintiff on August 27, 1942, paid to the said Collector of Internal Revenue

an additional amount of $3,716.42 asserted by the said Agent to be due.

5. Thereafter on May 25, 1943, plaintiff duly and regularly filed with the said Collector a claim for refund praying return of $4,361.88 plus interest on account of erroneous overstatement of the plaintiff's net income for the year 1939 in the amounts and for the reasons set forth in the said claim. Included in the said claim is the item herein sued for.

6. Prior to December 3, 1947, the other items covered in the said claim of refund were allowed by the Commissioner of Internal Revenue, but on the said date by registered mail, notice of the disallowance of the item herein sued for was sent to plaintiff by the Commissioner of Internal Revenue.

7. Said disallowance of the said portion of plaintiff's claim for refund was erroneous, and said plaintiff has paid excessive and illegal income taxes for the year 1939 for the reason, and upon the ground, as asserted in the said claim for refund, that there was erroneously included as income received by the plaintiff in his return for the said year, an amount of $2,500.00 advanced to him during the said year by the Estate of Eula Lee Merrill, deceased, of which estate plaintiff was executor.

8. In the course of the administration of the Estate of the said Eula Lee Merrill, the deceased wife of the plaintiff, plaintiff was on November 22, 1939, by an order of the Court of his appointment, authorized to pay to himself for his services as executor, the sum of $20,000 which was to be paid as follows:

On December 23, 1939, the sum of $12,500 and the balance on December 10, 1940.

9. In the tax return for 1939 aforesaid, plaintiff erroneously reported the full sum of $12,500 as income received by him as executor whereas, in truth and in good conscience, only $10,000 thereof was actually income to him and the other $2,500 was actually only an advance to him, subsequently repaid. The erroneous advance was occasioned by the fact that, under the laws of the State of Washington the entire community property is administered by the executor upon the death of one spouse, not merely the half over which the deceased spouse had the power of testamentary disposition. The estate of Eula Lee Merrill was entirely community. In effect, under the law of the State of Washington, the estate of the deceased spouse pays (and is charged with) only one-half of the administrative expenses, including executor's fees, the other half is chargeable against the share of the surviving spouse and where, as here, the surviving spouse is the executor, no income accrues to the executor by the transfer to himself of his own funds.

10. By reason of the erroneous inclusion of the said sum of $2,500 in the net income of plaintiff as aforesaid, plaintiff has paid an excessive tax for the said year in the sum of $525.00, and plaintiff is entitled to judgment on this cause of action in the full sum of $525.00 together with interest.

Second Cause of Action

1. Plaintiff adopts the allegations of paragraphs

1 and 2 of his First Cause of Action to the same extent as if herein repeated at length.

2. During the year 1941, plaintiff duly filed with the Collector of Internal Revenue of the United States for the District of Washington and Alaska, his income tax return for the year 1940 and paid on account of the tax liability thereon to the said Collector all amounts due according to the computations set forth in the said return.

3. Thereafter upon a Revenue Agent's Report issued in connection with an examination of the aforesaid return on September 16, 1946, plaintiff on January 23, 1947, paid to the said Collector of Internal Revenue an additional amount of $7,585.38 asserted by the said Agent to be due.

4. Thereafter on January 21, 1949, plaintiff duly and regularly filed with the said Collector a claim for refund praying return of $3,927.02 plus interest on account of erroneous overstatement of the plaintiff's net income for the year 1940 in the amount of $7,500 and for the reasons set forth in the said claim.

5. The ground for asserting that the inclusion of the said $7,500 in the net income of plaintiff for the year 1940 was erroneous, as asserted in said claim for refund, is that the said $7,500, which was set up in the said Report of the Revenue Agent as income received by plaintiff as executor of the Estate of Eula Lee Merrill, his deceased wife, on December 10, 1940 of said year, was never actually income received from the

estate of his wife, but was an advance, subsequently repaid, as is more fully explained in paragraphs 8 and 9 of the First Cause of Action hereinabove set forth, which are hereby incorporated by reference herein to the same extent as if repeated at length.

6. More than six months have elapsed since the filing of said claim for refund and no part of the same has been paid.

7. There is justly due and owing to plaintiff on account of this Second Cause of Action the full sum of $3,927.02 plus interest.

Wherefore, plaintiff demands judgment against the defendant, as follows:

(1) Upon the first cause of action in the sum of $525.00 plus interest.

(2) Upon the second cause of action in the sum of $3,927.02, plus interest.

(3) For his costs.

/s/ RAYMOND G. WRIGHT,

/s/ ARTHUR E. SIMON,
Wright, Innis, Simon & Todd,
Attorneys for Plaintiff.

State of Washington
County of King—ss.

R. D. Merrill, being first duly sworn, on his oath deposes and says:

I am the plaintiff named in the foregoing com-

plaint; I have read the same, know the contents thereof, and believe the same to be true.

/s/ R. D. MERRILL.

Subscribed and sworn to before me this 17th day of November, 1949.

[Seal] /s/ NELSON T. BRUCE,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed November 18, 1949.

[Title of District Court and Cause.]

ANSWER

The defendant, by J. Charles Dennis, United States Attorney for the Western District of Washington, Northern Division, generally denies all the allegations of the complaint, except such designated allegations as it expressly admits.

The defendant further answers as follows, the numbers of the following paragraphs corresponding respectively, to the numbers of the paragraphs of the complaint.

Answer to First Cause of Action

1. The defendant admits these allegations, except it denies the allegation or implication that the sums which the plaintiff seeks to recover were illegally assessed and collected or exceeded the amount of taxes legally assessed and collected.

2. The defendant admits these allegations.

3. The defendant admits these allegations.

4. The defendant admits these allegations, except it denies that the taxes were paid on August 27, 1942. The defendant says that the taxes were paid on August 25, 1942.

5. The defendant denies these allegations, except it admits that on May 25, 1943, the plaintiff duly and regularly filed a claim for refund, in the amount of $4,361.88, which speaks for itself with respect to its contents.

6. The defendant admits these allegations, subject to a computation determining the correctness of the amount of the item sued for.

7. The defendant denies these allegations, except it admits that the plaintiff was executor of the estate of Eula Lee Merrill, deceased.

8. The defendant admits these allegations, except that it is without knowledge or information sufficient to form a belief as to the truth of the allegation that the plaintiff's fee "was to be paid" in two installments as alleged.

The defendant says that the fee was, in fact, paid and received in two installments and on the dates as alleged.

9. The defendant admits that the entire estate of Eula Lee Merrill consisted of community property, and that under the laws of the State of Washington

the entire community property is administered by the executor upon the death of one spouse.

The defendant denies the remaining allegations.

10. The defendant denies these allgations.

Answer to Second Cause of Action

1. The defendant adopts the allegations of paragraphs 1 and 2 of its answer to the plaintiff's first cause of action, supra, to the same extent as if herein repeated at length.

2. The defendant admits these allegations, except it denies the allegation or implication that the plaintiff paid, during 1941, his entire tax liability.

3. The defendant admits these allegations, evcept it denies that the taxes were paid on January 23, 1947. The defendant says the taxes were paid on January 24, 1947.

4. The defendant admits these allegations, except it denies the allegations of the claim for refund and that the plaintiff's net income was overstated in his return. The defendant says that the plaintiff's net income was understated in his return. The defendant further says that the claim for refund speaks for itself with respect to its contents.

5. The defendant denies these allegations, except the allegations of paragraphs 8 and 9 of the plaintiff's first cause of action, its answers to which, supra, are hereby incorporated herein by reference to the same extent as if repeated at length. The de-

fendant says that the claim for refund speaks for itself with respect to its contents.

6. The defendant admits these allegations.

Wherefore, the defendant prays that judgment be entered for the defendant, with costs.

/s/ J. CHARLES DENNIS,
United States Attorney,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 19, 1950.

[Title of District Court and Cause.]

STIPULATION CONCERNING FACTS

It is hereby stipulated by and between the plaintiff in the above cause through his attorneys, Wright, Innis, Simon & Todd, and the defendant above named through and by J. Charles Dennis, United States Attorney for the said District and Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue, its attorneys, that the following matters are deemed admitted as to the issues framed by the complaint herein and by the answer thereto, without the necessity for the introduction of any evidence with reference thereto, upon the trial of the said cause:

1. That the jurisdiction of this Court herein arises under Title 28, United States Code, Section

1346 (a) (1) and Title 28, United States Code, Section 1402 (a).

2. That at all times herein referred to, plaintiff was and he now is a resident of Seattle, King County, Washington, within the Northern Division of the Western District of Washington.

3. That the plaintiff's wife, Eula Lee Merrill, died a resident of Seattle, Washington, on April 9, 1938, leaving a last will and testament which on April 21, 1938, was admitted to probate in the Superior Court of the State of Washington for King County. A true and correct copy of the certificate of qualification of the plaintiff as executor is hereto attached, marked Exhibit "A" and by reference made a part hereof.

4. That the said plaintiff and Eula Lee Merrill, prior to the death of the latter on April 9, 1938, lived in Seattle, Washington, and the estate consisted solely of community property belonging to the community composed of said Eula Lee Merrill and the plaintiff.

5. That on October 24, 1939, the plaintiff as executor filed his final report and petition for distribution, and on November 22, 1939, the Superior Court of the State of Washington for King County, in the Matter of the Estate of Eula Lee Merrill, deceased, entered a decree of distribution, which decree, among other things, provided "that the executor is hereby authorized and empowered to pay to himself for his services as executor in the probate of the

above estate the sum of $20,000.00 * * *"; that pursuant to the decree of distribution, the plaintiff as executor complied with the terms thereof, and distribution was made in accordance therewith. A true and correct copy of the decree of distribution of said date is hereto attached, marked Exhibit "B" and by reference made a part hereof.

6. That on December 23, 1939, and December 10, 1940, the plaintiff paid to himself as executor the sums of $12,500.00 and $7,500.00, respectively, both payments being made out of the decedent's one-half interest in the community property, the plaintiff having upon being qualified as executor on April 21, 1938, separated the said community property and only one-half thereof was taken over and reflected in the executor's books of account. That on December 30, 1939, the estate of Eula Lee Merrill had on deposit in the First National Bank of Seattle, Washington, the sum of $12,281.76 after payment of the $12,500.00 to R. D. Merrill by check dated December 23, 1939.

7. That on May 27, 1940, the plaintiff timely filed with the Collector of Internal Revenue of the United States for the District of Washington and the Territory of Alaska his income tax return for the year 1939 and paid on account of the tax liability thereon to the said Collector of Internal Revenue the sum of $2,839.07 during said year. Plaintiff included in said return the sum of $12,500.00 received by him during said year as executor's fees from the estate of Eula Lee Merrill, Seattle, Wash-

ington. A true and correct copy of said return is hereto attached, marked Exhibit "C" and by reference made a part hereof.

8. That in connection with an examination of the aforesaid income tax return of said plaintiff for the year 1939, and in accordance with the Revenue Agent's report issued in connection therewith, and as a result of adjustments not herein involved, a deficiency in tax of $3,716.42, together with interest assessed of $544.99, was paid by the said plaintiff to the Collector of Internal Revenue for the District of Washington as follows: August 25, 1942, $3,716.42; September 15, 1942, $544.99.

9. That thereafter on May 25, 1943, plaintiff timely filed with the said Collector of Internal Revenue a claim for refund in the sum of $4,361.88 based upon three issues, only the issue stated in paragraph (2) thereof being involved in this action. A true and correct copy of said claim for refund is hereto attached marked Exhibit "D" and by reference made a part hereof.

10. That prior thereto and on July 8, 1939, the said plaintiff, as executor of the last will and testament of Eula Lee Merrill, had timely filed an estate tax return with the said Collector of Internal Revenue. A true and correct copy thereof is hereto attached, marked Exhibit "E" and by reference made a part hereof.

11. That in said estate tax return, plaintiff, as executor, claimed a deduction of $20,000.00 on ac-

count of estimated executor's fees, but thereafter and during the examination of said estate tax return in December 1940, the Internal Revenue Agent conducting the investigation called attention of the plaintiff to the fact that for Federal estate tax purposes, only one-half of the executor's fee could be claimed as a deduction in the estate tax return by reason of the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of Lang's Estate vs. Commissioner of Internal Revenue, 97 F. (2d) 867. The plaintiff, as executor, accordingly acquiesced in the position of said Agent as aforesaid, and on or about January 4, 1941, paid the balance of Federal estate tax in full as recommended by said Agent with a deduction on account of executor's fees of only $10,000.00.

12. That after the conference with the Agent of the Bureau of Internal Revenue regarding the estate tax return as aforesaid, and on December 31, 1940, the plaintiff, on his individual books of account, credited the estate with the sum of $10,000.00, and a corresponding entry was made on the books of account of the estate. The journal entry on the plaintiff's books of account is as follows:

Dec. 31, 1940	Debit	Credit
R. D. Merrill—withdrawals....	$7,500.00	
Salaries and fees	7,500.00	
Estate of Eula Lee Merrill.....		$15,000.00

To charge salaries and fees with amount of executors fees paid R.D.M. in 1940 ($7,500) and charge withdrawals with $2,500 executor fee paid R.D.M.

in year 1939 (and reported as income) which represent one-half of total executor fee of $20,000 claimed on Estate Federal Tax return, only one-half of same allowable. Also to charge withdrawals with unallowed one-half of attorney fees of $10,000, $5,000 allowed.

The journal entry on the books of account of the estate is as follows:

Dec. 31, 1940	Debit	Credit
R. D. Merrill	$15,000.00	
Executor and attorney fees		$12,500.00
Estate corpus		2,500.00

To charge R. D. Merrill with one-half of executor and attorney fees not allowed on final return, per audit.

That after giving effect to the foregoing, the books of account of the plaintiff and of the estate reflected that on December 31, 1940, the plaintiff was indebted to the estate in the sum of $20,190.97, which account was finally balanced by cash payment by plaintiff to the trust referred to in paragraph 13 (K) of Exhibit "B", attached hereto, in the amount of $11,174.86 on August 14, 1943.

13. That on September 15, 1941, plaintiff timely filed with the Collector of Internal Revenue for the District of Washington, his income tax return for the year 1940, and paid the tax liability shown to be due thereon. A true and correct copy of said return is hereto attached, marked Exhibit "F" and by reference made a part hereof.

14. That thereafter, Internal Revenue Agent E. E. Harney, by report dated September 16, 1946 (resubmitted December 2, 1946), recommended a deficiency of $9,300.08, based in part upon the failure of the plaintiff to include in gross income the said $7,500.00 as executor's fees received by plaintiff during the taxable year. The plaintiff paid said deficiency, together with interest assessed of $3,226.87, to the said Collector of Internal Revenue as follows: June 11, 1941, $3,668.65; January 24, 1947, $7,585.38, and July 2, 1947 (by credit), $1,272.92. A true and correct copy of said Agent's report is hereto attached marked Exhibit "G" and by reference made a part hereof.

15. That prior to December 3, 1947, the other items covered in the claim for refund for the year 1939, Exhibit "D" attached hereto, referred to in paragraph 9 hereof, were allowed by the Commissioner of Internal Revenue, but on the said date, by registered mail, notice of the disallowance of the item which is the subject of the First Cause of Action set forth in the complaint of the plaintiff herein was sent to the plaintiff by the Commissioner of Internal Revenue. A true and correct copy of the said notice of disallowance is hereto attached, marked Exhibit "H" and made a part hereof.

16. That thereafter, on January 21, 1949, plaintiff timely filed with the said Collector a claim for refund in the sum of $3,927.02, plus interest, on account of alleged erroneous overstatement of plaintiff's net income for the year 1940 in the amount of

$7,500.00, upon the grounds and for the reasons set forth in said claim. A true and correct copy of said claim is hereto attached, marked Exhibit "I" and by reference made a part hereof.

17. That more than six (6) months elapsed after the filing of said claim for the year 1940, Exhibit "I", prior to the institution of this action, and that no part of the said claim referred to in the Second Cause of Action set forth in the plaintiff's complaint had been allowed or paid at the time of the filing of the said action nor up to this date.

18. That no part of the demand asserted in plaintiff's First Cause of Action has been paid.

Dated this 15th day of October, 1951.

WRIGHT, INNIS, SIMON & TODD,
Attorneys for Plaintiff.

/s/ J. CHARLES DENNIS,
United States Attorney;

/s/ THOMAS R. WINTER,
Special Assistant to the Chief Counsel, Bureau of Internal Revenue, Attorneys for Defendant.

[Endorsed]: Filed October 16, 1951.

[Title of District Court and Cause.]

NOTICE OF PRESENTATION

To the Defendant Above Named and J. Charles Dennis, United States Attorney, and Thomas R. Winter, Special Assistant to the Chief Counsel of the Bureau of Internal Revenue, Its Attorneys:

You Are Hereby Notified that the plaintiff in the above cause will present to Honorable William J. Lindberg, one of the Judges of the above Court, for signature on Monday, February 18, 1952, at 10:00 o'clock A. M., or as soon thereafter as counsel may be heard, in the Courtroom of the said Judge in the United States Court House at Seattle, Washington, Findings of Fact, Conclusions of Law and a Judgment, copies whereof are herewith served upon you.

WRIGHT, INNIS, SIMON & TODD,

/s/ ARTHUR E. SIMON.

Receipt of copy acknowledged.

[Endorsed]: Filed February 18, 1952.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Be It Remembered, that the above cause came on duly and regularly for trial before Honorable William J. Lindberg, one of the Judges of the above Court, on the 16th day of October, 1951, and the plaintiff appearing in person and by Arthur E. Simon, of Wright, Innis, Simon & Todd, his attorneys, and the defendant being represented by J. Charles Dennis, United States Attorney, and Thomas R. Winter, Special Assistant to the Chief Counsel of the Bureau of Internal Revenue, and the parties having introduced their evidence and having rested, and the said parties having submitted written briefs, and the matter having been further argued orally on February 11, 1951, and the Court being in all things fully advised, now makes the following Findings of Fact:

As to the First Cause of Action

1. That the jurisdiction of this Court herein arises under Title 28, United States Code, Section 1346 (a) (1) and Section 1402 (a).

2. That at all times herein referred to, plaintiff was, and he now is, a resident of Seattle, King County, Washington, within the Northern Division of the Western District of Washington.

3. That during the year 1940, plaintiff duly filed with the Collector of Internal Revenue of the United

States for the District of Washington and Alaska his income tax return for the year 1939 and paid on account of the tax liability thereon to the said Collector the sum of $2,839.07 during the said year.

4. That thereafter upon a Revenue Agent's Report issued in connection with an examination of the aforesaid return on May 27, 1942, plaintiff on August 25, 1942, paid to the said Collector of Internal Revenue an additional amount of $3,716.42 asserted by the said Agent to be due.

5. That thereafter on May 25, 1943, plaintiff duly and regularly filed with the said Collector a claim for refund praying return of $4,361.88, plus interest, on account of erroneous overstatement of the plaintiff's net income for the year 1939 in the amounts and for the reasons set forth in the said claim. A true copy of the said claim for refund was regularly admitted in evidence herein as Exhibit D, and the item for which recovery is herein sought was included in the said claim.

6. That prior to December 3, 1947, the other items covered in the said claim for refund, and not here involved, were allowed by the Commissioner of Internal Revenue but that on the said date, by registered mail, notice of the disallowance of the item herein sued for was sent to the plaintiff by the Commissioner of Internal Revenue. A true and correct copy of the said notice was duly received in evidence herein as Exhibit H.

7. That said disallowance of the said portion of

the plaintiff's claim for refund was erroneous and that said plaintiff had paid excessive and illegal income taxes for the year 1939 for the reason and upon the ground, as asserted in the said claim for refund, that there was erroneously included in his return for the said year as income received by the plaintiff an amount of $2,500.00 which was advanced to him during the said year by the Estate of Eula Lee Merrill, Deceased, which Estate the plaintiff was engaged in settling during the said year as Executor under the non-intervention will. A certified copy of the certificate of qualification of the plaintiff, as Executor as aforesaid, was duly received in evidence herein as Exhibit A.

8. That in the course of the administration of the Estate of the said Eula Lee Merrill, the deceased wife of the plaintiff, plaintiff was on November 22, 1939, by an order of the Court of his appointment, authorized to pay to himself for his services, as Executor, the sum of $20,000.00. A certified copy of the said order was duly received in evidence herein as Exhibit B. That the said sum of $20,000.00 was paid in installments in the sum of $12,500.00 on December 23, 1939 and the balance of $7,500.00 on December 10, 1940.

9. That in the income tax return for 1939 aforesaid, plaintiff erroneously reported the full sum of $12,500.00 as income received by him as Executor whereas, in truth and in fact, only $10,000.00 thereof was actually income to him and the other $2,500.00 was actually only an advance to him which he sub-

sequently repaid. That the erroneous advance was occasioned by the fact that, under the laws of the State of Washington the entire community property is administered by the Executor upon the death of one of the spouses, not merely the one-half over which the deceased spouse had the power of testamentary disposition. That the Estate of Eula Lee Merrill was composed entirely of community property. That under the law of the State of Washington, the Estate of the deceased spouse pays (and is charged with) only one-half of the administrative expenses, including executor's fees, the other half is chargeable against the share of the surviving spouse and that where, as here, the surviving spouse is the executor, no income accrues to the executor by the transfer to himself of his own funds.

10. That by reason of the erroneous inclusion of the said sum of $2,500.00 as income to the plaintiff in his income tax return for the year 1939, as aforesaid, plaintiff paid an excessive tax for the said year in the sum of $525.00.

As to the Second Cause of Action

1. The Court adopts the allegations of Paragraphs 1 and 2 of the Findings with reference to the First Cause of Action, as hereinabove set forth, to the same extent as if herein repeated at length.

2. That during the year 1941, plaintiff duly filed with the Collector of Internal Revenue of the United States, for the District of Washington and Alaska, his income tax return for the year 1940 and

paid on account of the tax liability thereon to the said Collector all amounts due according to the computations set forth in the said return, a true copy whereof was duly admitted in evidence herein as Exhibit F.

3. That thereafter, upon a Revenue Agent's Report issued in connection with an examination of the aforesaid return on September 16, 1946, which was duly admitted in evidence herein as Exhibit G, plaintiff on January 24, 1947, paid to the said Collector of Internal Revenue an additional amount of $7,585.38 asserted by the said Agent to be due.

4. That thereafter, on January 21, 1949, plaintiff duly and regularly filed with the said Collector a claim for refund praying return of $3,927.02, plus interest, on account of erroneous overstatement of the plaintiff's net income for the year 1940 in the amount of $7,500.00 for the reasons set forth in the said claim. A true and correct copy of the said claim was duly admitted in evidence herein as Exhibit I.

5. That the ground for asserting that the inclusion of the $7,500.00 in the net income of plaintiff for the year 1940 was erroneous, as asserted in said claim for refund, is that the said $7,500.00, which was set up in the said Report of the said Revenue Agent as income received by plaintiff as Executor of the Estate of Eula Lee Merrill, his deceased wife, on December 10, 1940 of said year, was never actually income received from the Estate of his wife, but was an advance which he subsequently repaid, as is more fully explained in Paragraphs 8 and 9

of the Findings of Fact with reference to the First Cause of Action hereinabove set forth, which are hereby incorporated by reference herein to the same extent as if repeated at length.

6. That more than six months had elapsed since the filing of the aforesaid claim for refund before the institution of this cause of action and that no part of the amount claimed therein has been paid.

Done in Open Court this 18th day of February, 1952.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

From the foregoing Findings of Fact, the Court deduces the following Conclusions of Law:

1. That there is justly due and owing to plaintiff from the defendant upon the First Cause of Action herein set forth the full sum of $525.00 together with interest thereon at six per cent per annum from August 25, 1942.

2. That there is justly due and owing to plaintiff by defendant on account of the Second Cause of Action herein the full sum of $3,927.02 together with interest thereon at the rate of six per cent per annum from January 24, 1947.

3. That the plaintiff is entitled to judgment accordingly and for his costs herein to be taxed to the extent permitted under Title 28, United States Code, Section 2412 (b).

Done in Open Court this 18th day of February, 1952.

/s/ WILLIAM J. LINDBERG,
United States District Court.

Presented by:

/s/ ARTHUR E. SIMON, of
WRIGHT, INNIS, SIMON & TODD,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed February 18, 1952.

In the United States District Court for the Western District of Washington, Northern Division

Civil Action No. 2418

R. D. MERRILL,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

Be It Remembered, that this cause came on duly and regularly for hearing on the 16th day of October, 1951, before Honorable William J. Lindberg, one of the Judges of the above Court, and the plaintiff appearing in person and being represented by

Arthur E. Simon, of Wright, Innis, Simon & Todd, his attorneys, and the defendant being represented by J. Charles Dennis, United States Attorney, and Thomas R. Winter, Special Assistant to the Chief Counsel of the Bureau of Internal Revenue, and the parties having introduced their evidence and having submitted written briefs and having presented oral arguments on February 11, 1952, and the Court being in all things fully advised, and having made and signed and caused to be entered written Findings of Fact and Conclusions of Law, now, therefore, in accordance therewith it is by the Court,

Ordered, Adjudged and Decreed:

1. That plaintiff do have and recover of the said defendant upon the First Cause of Action herein the full sum of $525.00 together with interest thereon at the rate of six per cent per annum from August 25, 1942, until paid.

2. That the plaintiff do have and recover of the said defendant upon the Second Cause of Action herein the full sum of $3,927.02 together with interest thereon at the rate of six per cent per annum from January 24, 1947, until paid.

3. That the said plaintiff do further recover of the said defendant his costs herein to be taxed to the extent such costs are allowable under Title 28, United States Code, Section 2412 (b).

Done in Open Court this 18th day of February, 1952.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Presented by:

/s/ ARTHUR E. SIMON, of
WRIGHT, INNIS, SIMON & TODD,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed February 18, 1952.

In the District Court of the United States for the Western District of Washington, Northern Division

Number 2418

R. D. MERRILL,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

TRANSCRIPT OF COURT'S ORAL DECISION

in the above-entitled and numbered cause, in the United States Court House, at Seattle, Washington, on the 11th day of February, 1952, at 10:00 o'clock a.m., by the Honorable William J. Lindberg, United States District Judge.

Appearances:

ARTHUR E. SIMON, ESQ., of
WRIGHT, INNIS, SIMON & TODD,
Appeared on Behalf of Plaintiff.

THOMAS R. WINTER, ESQ.,
Assistant United States Attorney,
Appeared on Behalf of Defendant.

PROCEEDINGS

(Argument having been made by the respective Counsel, the following proceedings were had, to wit:)

The Court: It is the decision of the Court in this case that the ten thousand dollars ($10,000.00) involved here in the two (2) causes of action, twenty-five hundred dollars ($2,500.00) in the first and seventy-five hundred dollars ($7,500.00) in the second cause of action, were mistakenly reported as income, and, in fact, ten thousand dollars ($10,000.00)—twenty-five hundred dollars ($2500.00) in 1939—is that correct?

Mr. Simon: Yes, your Honor.

The Court (Continuing): ——and seventy-five hundred dollars ($7,500.00) in 1940 were, in fact, not income under the laws and decisions of the State of Washington. The ten thousand dollars ($10,000.00) of the twenty thousand dollars ($20,000.00) chargeable to the one-half of the community estate that passed by inheritance was income and the remaining ten thousand dollars ($10,000.00) was chargeable, not to the one-half of the Estate that passed by inheritance but, rather, to the Plaintiff's one-half of the community estate, and that if it were paid to him it was payable not only out of the cor-

pus of the community estate but out of his one-half (½) and, therefore, would not constitute income.

(Whereupon, there was colloquy between Court and Counsel, and the following proceedings were had, to wit:)

The Court: There should be findings.

Mr. Simon: Yes. I will submit them to Counsel.

(Whereupon, other matters were considered and hearing in the within-entitled and numbered cause was adjourned.)

Certificate

I, Earl V. Halvorson, official court reporter for the within-entitled court, hereby certify that the foregoing is a true and correct transcript of matters therein set forth.

[Endorsed]: Filed March 13, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: R. D. Merrill, Plaintiff, and to Wright, Innis, Simon & Todd, his attorneys:

You and each of you will take notice that defendant, United States of America, does hereby appeal to the United States Court of Appeals, for the Ninth Circuit from that certain judgment, findings and conclusions entered in the above-entitled case on the

18th day of February, 1952, and each and every part and the whole thereof.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ THOMAS R. WINTER,
Special Assistant to the Chief Counsel, Bureau of Internal Revenue, Attorneys for Defendant.

[Endorsed]: Filed April 16, 1952.

[Title of District Court and Cause.]

ORDER

This matter coming on to be heard ex parte this date on motion of the United States of America, through its attorneys, J. Charles Dennis, United States Attorney for the Western District of Washington, and Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue, for an order extending time for filing the record on appeal and docketing the within action in the United States Court of Appeals for the Ninth Circuit, and the Court being fully advised in the premises,

It Is Ordered that the time for filing the within appeal be, and is hereby extended to ninety days from the date of the filing of the first Notice of Appeal, to wit, the 15th day of July, 1952.

Made and entered at Seattle, Washington, this 20th day of May, 1952.

/s/ WILLIAM J. LINDBERG,
Judge.

Presented by:

/s/ THOMAS R. WINTER.

[Endorsed]: Filed May 20, 1952.

[Title of District Court and Cause.]

ORDER

The appellant, having designated for inclusion in the record on appeal the complete record and all the proceedings in the action, and good cause appearing therefor, it is hereby

Ordered that the Clerk transmit to the United States Court of Appeals for the Ninth Circuit as a part of the record thereof all exhibits which were received in evidence in the action.

Dated this 9th day of June, 1952.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Presented by:

/s/ THOMAS R. WINTER.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 9, 1952.

In the District Court of the United States for the Western District of Washington, Northern Division

Number 2418

R. D. MERRILL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

TRANSCRIPT OF TESTIMONY OF JUSTIN M. MARTIN,

had on the 16th day of October, 1951, commencing at 10:00 o'clock, a.m., before the Honorable William J. Lindberg, United States District Judge, at Seattle, Washington.

Appearances:

ARTHUR E. SIMON, of
WRIGHT, INNIS AND TODD,

Appeared on Behalf of the Plaintiff.

THOMAS R. WINTER,
Special Assistant to the Attorney General,

Appeared on Behalf of the Defendant.

Whereupon, the following proceedings were had, to wit: [1*]

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

Proceedings

(Colloquy having been had between the Court and Counsel, and exhibits having been offered and received, the following proceedings were had, to wit:)

The Court: You may proceed, Mr. Simon.

Mr. Simon: I should like to call Mr. Justin Martin as a witness, please.

Whereupon,

JUSTIN M. MARTIN

was called as a witness, and, upon being first duly sworn, testified as follows:

Direct Examination

By Mr. Simon:

Q. Will you state your name, please?

A. Justin M. Martin.

Q. Do you reside in the City of Seattle?

A. That is right.

Q. How long have you lived here, sir?

A. Since 1931.

Q. What is your vocation?

A. I am a certified public accountant.

Q. How long have you been such, Mr. Martin?

A. Since May, 1936.

Q. And—— [2]

Mr. Winter: We admit his qualifications.

Mr. Simon: All right.

Q. (By Mr. Simon): With what firm, if any, have you been associated during this period?

(Testimony of Justin M. Martin.)

A. I have been employed by the firm of Ernst and Ernst.

Q. And during what period of time have you, on behalf of that firm, been engaged with the accounts and income tax returns of Mr. R. D. Merrill, the Plaintiff in this case?

A. Since December, 1936.

Q. And what, in general, has been the nature of your employment in connection therewith, both as to your firm and as to you individually, with reference to the supervision that you have exercised during that period over his accounts?

A. Well, I work—we have advised him, of course, in connection with income tax matters. We have prepared the income tax returns in his office for himself and for the other entities, and there are a number of them in that office.

In fact, we have given general public accounting service that covered every phase of work [3] that might be required of a public accountant during that period.

Q. Specifically, during the years 1939 and '40 were the accounts of Mr. R. D. Merrill, individually, and of the estate of Beulah Lee Merrill subject to your supervision? A. That is right.

Q. Mr. Martin, in the stipulation concerning facts which has been introduced into evidence herein, and with which you are familiar, there is a reference in paragraph twelve (12) to certain journal entries. You are familiar with those journal entries? A. Yes, I am.

(Testimony of Justin M. Martin.)

Q. Will you tell us, please, what was the occasion for the journal entries referred to in paragraph twelve (12) of the stipulation?

A. During the month of December, 1940, in the course of discussions with the Internal Revenue agents concerning the Federal estate tax return of the Beulah Merrill estate, we became convinced that only one-half (½) of the administration expenses, including the executor's fee, was payable out of Mrs. Merrill's half of the community estate.

Since the full payment—since the full executor's fee, allowed to Mr. Merrill in the amount [4] of twenty thousand dollars ($20,000.00) had been paid out of Mrs. Merrill's property, we recommended that he regard ten thousand dollars ($10,000.00) of this payment as being merely an advance to him and that he be charged for it on the books.

These entries to which you refer we suggested to reflect that transaction.

Upon Mr. Merrill's direction, they were entered on the books as recited in the stipulation.

Mr. Simon: That is all I have of this witness.

Cross-Examination

By Mr. Winter:

Q. Mr. Martin, as I understand it, on December 23, 1939, and after the order of distribution was entered in the Probate Court, paid Mr. Merrill twelve thousand five hundred dollars ($12,500.00), check clearing December *39,* 1939, as executor's fee?

(Testimony of Justin M. Martin.)

A. That is right.

Q. And in preparing his return you showed Mr. Merrill as having an income from that estate of twelve thousand five hundred dollars ($12,500.00) in 1939? A. That is right. [5]

Q. On December 10, 1940, the estate, by check, paid Mr. Merrill seven thousand five hundred dollars ($7,500.00) on the balance of the twenty thousand dollar ($20,000.00) fee which was allowed to Mr. Merrill as executor's fee for service in administering the estate? A. That is right.

Q. Now, the estate had substantial income and filed income tax returns for those two (2) years, didn't it? A. Yes, it did.

Q. Now, after December 10th, as I understand it, an agent was investigating the estate tax return; nothing to do with the income tax but the estate tax return of the estate? A. That is right.

Q. And you had claimed in the estate tax return, which had been filed before—prior—you had claimed a twenty thousand dollar ($20,000.00) estimated executor's fee? A. That is right.

Q. And an estimated twenty thousand dollar ($20,000.00) executor's fee was allowed by Probate Court and an order was entered?

A. That is right. [6]

Q. When the agent told you you couldn't claim in the estate tax return more than ten thousand dollars you, as I understand it, consented to the position of the Internal Revenue agent and paid the estate tax on that? A. Right.

(Testimony of Justin M. Martin.)

Q. And then you made these entries on the books after that? A. That is right.

Mr. Winter: That is all.

The Court: Just one question. The agent you referred to as advising this, is that the Internal Revenue agent or the Tax Commission agent?

Mr. Winter: Internal Revenue agent. The copy of his—no, no. A copy of his report is not in there. That was the estate tax revenue agent.

Mr. Simon: I believe it is. I believe his report is in there.

Mr. Winter: No, not the estate tax agent's. It has been stipulated. It was a revenue agent.

Under the Lion decision, your Honor, only one-half (½) of the cost of administration is includable, or is deductible, for estate tax purposes. [7]

But, we are not concerned here with the estate tax return but with the——

The Court: Income tax.

Mr. Winter: Individual income tax liability.

There is no dispute that the fee of twenty thousand dollars ($20,000.00) was paid in 1939 and 1940, and then subsequently these entries were made, and that is in the stipulation and this is in explanation of that.

Mr. Simon: Just two (2) questions, Mr. Martin.

Redirect Examination

By Mr. Simon:

Q. The estate of Beulah Lee Merrill, and the income tax returns, to which Mr. Winter referred, at no time claimed——

(Testimony of Justin M. Martin.)

Mr. Winter: Now, if the Court please, we will object to that as calling for a conclusion of the witness and not the best evidence.

The returns themselves will show what they claim, the individual income tax returns.

The Court: I will ask Mr. Simon to finish the question. [8]

Mr. Simon: Yes.

Mr. Winter: Excuse me, your Honor.

Mr. Simon: May I say first that Counsel's cross-examination of this witness is the first reference to income tax returns of the estate. I contemplate asking this witness one question as follows:

Q. (By Mr. Simon): Mr. Martin, in the income tax returns of the estate of Beulah Lee Merrill, concerning which Mr. Martin—or Mr. Winter—inquired of you on your cross-examination, no claimed deduction was made on account of any executor's fee——

Mr. Winter (Interposing): Now, if the Court please——

Q. (By Mr. Simon, continuing): ——paid to Mr. Merrill, was there?

Mr. Winter: Have you finished the question?

Mr. Simon: Yes.

Mr. Winter: We object to it as not the best evidence. The returns themselves will show what deductions were made and this is going into a collateral matter. [9]

(Testimony of Justin M. Martin.)

The witness testified he prepared the returns and I merely inquired whether he prepared all of them, including the income tax returns of the estate. I didn't go into that, merely cross-examination on the question Counsel asked.

Now, if he is going to go into the income tax of the estate, that will take an entire—there is no issue here about it.

Mr. Simon: Well, Counsel asked the question and I am merely trying to avoid a possible inference.

Counsel asked whether, during that period, the estate had income, and I am merely trying to establish by this witness's testimony, concerning which I do not believe there is the slightest controversy, that in those income tax returns for the estate, which were inquired about under the circumstances I have just mentioned for the first time by Counsel, that had nothing to do with the case and I don't want an inference dangling in the air.

I merely propose to show by this witness that those income tax returns of the estate of Beulah Lee Merrill made no reference to any payment of executor's fees to R. D. Merrill and claimed no deduction on account thereof. [10]

Mr. Winter: What difference is that going to make, your Honor.

The Court: I see no damage in answering the question, if the witness knows, Mr. Winter, and he may answer.

Do you recall the question?

The Witness: Yes, I do.

(Testimony of Justin M. Martin.)

A. There was no deduction claimed at any time by the estate for income tax purposes in the income tax returns filed.

Mr. Simon: That is all.

Recross-Examination

By Mr. Winter:

Q. You don't know whether such a deduction could be claimed or not, do you?

Mr. Simon: I object to that as irrelevant and immaterial.

Mr. Winter: He has gone into it, if the Court please. He asked over my objection.

The Court: I think he merely stated a fact, Mr. Winter, in his testimony as he knows it. Now you are asking about a conclusion.

Q. (By Mr. Winter): You took all the possible expense deductions in that return, didn't you? [11]

Mr. Simon: Objected to as not the best evidence.

Q. (By Mr. Winter): Do you remember whether you took all the business expenses——

Mr. Simon: Objected to as not the best evidence.

Mr. Winter: He asked the same thing, if the Court please.

The Court: He may answer, if he knows.

A. The business expenses were claimed as deductions.

Q. (By Mr. Winter): Yes. You are familiar with the Berman Trust Case in the Supreme Court of the United States, aren't you?

(Testimony of Justin M. Martin.)

Mr. Simon: Objected to as——

The Court: Sustained.

Q. (By Mr. Winter): You are a certified public accountant? A. That is right.

Q. And you advise tax payers and you have been advising these tax payers since 1936?

A. That is right.

Q. It was on your advice that they included [12] the twelve thousand five hundred dollars ($12,500.00) and seven thousand five hundred dollars ($7,500.00) as income in Mr. Merrill's returns, and they were so filed? A. I beg your pardon.

Mr. Simon: I beg your pardon. I don't believe that is accurate. The seventy-five hundred dollars ($7500.00) was never included in his return.

Q. (By Mr. Winter): Well, it was paid before you talked to the revenue agent about the Lion case, wasn't it?

Mr. Simon: Yes, and it was charged on the books.

Mr. Winter: I am merely asking the witness. Do you want to testify, Counsel? If you want to, be sworn.

Mr. Simon: No, I am just trying to be——

Mr. Winter: Why don't you make your objection to the Court.

Mr. Simon: I did make an objection to the Court.

The Court: What was the question?

Mr. Winter: I will repeat it.

Q. (By Mr. Winter): It was upon your advice

(Testimony of Justin M. Martin.)

that you included [13] in Mr. Merrill's individual income tax return for the year 1939 the sum of twelve thousand five hundred dollars ($12,500.00) which was paid to him as executor's fees?

A. That is right.

Q. And it was upon your advice that the seven thousand five hundred dollars ($7,500.00) was paid to Mr. Merrill under the same circumstances on December 10, 1940? A. That is right.

Q. Was it your intention to include that seventy-five hundred dollars ($7500.00) as income to Mr. Merrill before you heard about the Lion case?

A. I can't recall the sequence. You are getting down to such close dates.

Q. Well, you paid the estate—the estate paid the seventy-five hundred dollars ($7500.00) executors fees before you talked to the agent, didn't you, in 1940?

A. There were a series of discussions going on with the agent in the latter part of 1940 that covered several months. They were not restricted to a single month.

Q. With the estate tax return?

A. That is right. [14]

Q. You got a copy of the estate tax return?

A. Yes.

Q. I mean, you got a copy of the agent's report?

A. That is right.

Q. And it wasn't until after you had paid the seventy-five hundred dollars ($7500.00) that you made this revising entry in the books?

(Testimony of Justin M. Martin.)

A. That is right.

Q. And at the time—at the time you made the revising entry, Mr. Merrill owed the estate some twenty thousand dollars ($20,000.00)?

Mr. Simon: It was stipulated.

Q. (By Mr. Winter): Didn't he?

A. That is right. May I clarify——

Q. And that account was no— He never did pay back to the estate any money, did he?

A. May I clarify that preceding statement? Mr. Merrill owed the estate, after the effect of the reversing entry, some twenty thousand dollars ($20,000.00).

Q. Yes, and those accounts were not settled with the resulting trust, or the trust established under the will, until about 1943? [15]

A. That is right.

Mr. Winter: We have no further questions.

Mr. Simon: Just two (2) questions for clarification.

Redirect Examination

By Mr. Simon:

Q. Counsel has referred to the income tax returns filed under your advice by Mr. Merrill for the year 1940.

I will ask you whether in that income tax return you included as income the seventy-five hundred dollars ($7500.00) which was paid on December 10, 1940?

Mr. Winter: Are you through?

(Testimony of Justin M. Martin.)

Mr. Simon: Yes.

Mr. Winter: If the Court please, the return is in evidence and that is the best evidence of what it contains.

Mr. Simon: I think that is right, but he inquired about it.

Mr. Winter: May we have an exception to the Court's admitting testimony relative to the individual returns of the estate which is the best evidence also? [16]

Mr. Simon: Counsel framed a question——

The Court: The Court is at a loss in this matter, not being familiar with the facts as you gentlemen are.

Of course, the facts are the best evidence. It is rather difficult to determine the propriety of the question at this time.

Mr. Simon: Well, I think Mr. Winter will stipulate with me, for the enlightenment of the Court, that the tax return, which is in evidence, indicates that there was no reporting of that seventy-five hundred dollars ($7500.00) as income in the tax return as filed.

Mr. Winter: I can only stipulate that the return shows—I could say this to the Court, that I can find no reference to seventy-five hundred dollars ($7500.00), and I haven't examined the return.

I don't think, personally, it was in there, but the return is the best evidence, if the Court please. The return wasn't filed until 1941.

(Testimony of Justin M. Martin.)

The Court: It is the 1940 return of R. D. Merrill?

The Witness: That is right.

The Court: Seventy-five hundred dollars [17] ($7500.00) was paid on December 10th?

Mr. Simon: That is right.

Mr. Winter: And the return wasn't filed until September 18, 1941. An extension was granted to September 15, 194——

The Court: The question put to the witness was whether or not the payment made to Mr. Merrill on December, 1940, was included in his income tax returns.

Mr. Winter: It was not. It has been stipulated in the record, if the Court please, that upon three (3) issues only one (1) of which is involved herein, the additional tax was asserted of $9300.08, based in part upon the failure to include the seventy-five hundred dollars ($7500.00) in the 1943 return.

So that answers counsel's question. I forgot about that stipulation, but still the return is the best evidence of what it shows and that has been agreed.

I call your Honor's attention to paragraph——

The Court: You were talking about twelve (12) at the beginning.

Mr. Simon: This is a little subsequent, [18] I think.

Mr. Winter: This is paragraph——

Mr. Simon: Paragraph fourteen (14).

Mr. Winter: Yes, paragraph fourteen (14).

It is the revenue agent's report showing he recom-

(Testimony of Justin M. Martin.)

mended a deficiency of ninety-three hundred dollars ($9300.00) based in part upon a failure to include in the gross income of his return the seventy-five hundred dollars ($7500.00), your Honor.

The Court: Now the question put to the witness was a question as to the payment—to the payment made—the inclusion of the seventy-five hundred dollars ($7500.00) in the report of the estate rather than——

Mr. Simon: No, your Honor. I was merely trying to clarify what I thought might have been somewhat confusing.

When counsel asked a question of whether in the first instance, a question that I objected to, the twelve thousand five hundred ($12,500.00) and seventy-five hundred dollars ($7500.00) were not, under the advice of this man, returned to Mr. Merrill as income during 1939 and 1940 in the income tax [19] returns of that year, and in order to clarify it—I don't think that there was really any dispute about it under the stipulation—I was merely trying to elicit from the witness what was in part already in the stipulation, that, in the first instance the seventy-five hundred dollars which Mr. Merrill got on the 10th of December, 1940, was not reported as income in his return for 1940, and subsequently that the exclusion of that item of income during the year 1940 was upon Mr. Martin's advice.

The Court: With that statement, is that the fact, Mr. Winter?

Mr. Winter: Yes, your Honor. The fact is that

(Testimony of Justin M. Martin.)

in 1939 the return filed in March 15, 1940, presumably, about that time, Mr. Merrill included the twelve thousand five hundred dollars ($12,500.00) which he received in 1939 as executors fee received by him. On December 10th they paid Mr. Merrill, as executor for his services, seven thousand five hundred dollars ($7,500.00).

After December 10th, according to the stipulation, the agent came in investigating the estate tax return where they claimed the entire twenty thousand ($20,000.00) as an estimated executor's fee, and an order of distribution to that effect had [20] been entered and it had been paid. Well, after they had paid it on December 10, 1940, and before the end of the year, they talked with the agent and the agent said for estate tax purposes you can claim only half of that on the estimated tax return for estate tax purposes.

That has nothing to do with Mr. Merrill's returns here.

Then, on December 30th, they made these entries that they consider these payments over and above ten thousand dollars as advance and they made these entries.

That is the testimony.

The return for 1940 was not due until March 15, 1941, or nine (9) months later. At that time, of course, having taken the position that they are taking in this case, the return was filed on the basis that it was not, that only the first ten thousand

(Testimony of Justin M. Martin.)

($10,000.00) that was paid was income to Mr. Merrill.

In other words, ten thousand ($10,000.00) of the first twelve thousand five hundred dollars ($12,-500.00) is the plaintiff's position here, the Government's position is that that is not true, that even if they can't convince the Court, by some [21] reasoning which I can't see, that only half of that ten thousand (10,000) in any event—only half of that first twelve thousand five hundred dollars ($12,-500.00), or $6,750.00, would be included in the 1939 individual return and then half of the seventy-five hundred dollars ($7500.00) would be included in Mr. Merrill's return in 1950. We take that position also, but that is an alternative position. If the Court should find entirely for the plaintiff in this case, the Court can not find any more than that amount even on that theory is our position.

But that is an alternative position.

The Court: The Court would like to avoid getting into argument, not being familiar with the facts. I appreciate your statement, Mr. Winter. Are we in position now to continue with this witness, or do you feel the question you asked is essential or not?

Mr. Simon: I would like to have the question answered, though I don't believe there is any dispute about it, merely to avoid having this possible misunderstanding, though I think it has been clarified and I think that I have said before that the answer is implicit in what we have already stipulated and I would like to, in order that I may be sure we [22]

(Testimony of Justin M. Martin.)

understand one another, ask this witness merely to be sure we all understand one another, a leading question to this effect:

Q. (By Mr. Simon): Mr. Simon, the seventy-five hundred dollars ($7500.00) which Mr. Merrill paid to himself on December 10, 1940, out of the funds of Beulah Lee Merrill's estate for the balance of the executor's fees allowed him was not reported by him in his income tax return for 1940 as income, was it? A. It was not.

Q. And the reason that it was not was because of your advice? A. That is right.

Q. And the basis of your advice was that, as shown by your testimony regarding the journal entries of December 31, 1940, that prior to the end of the month in which the payment was made and received, and prior to the close of the taxable year, Mr. Merrill agreed and had entered upon the books an acknowledgement that this was not received as income but only as an advance; is that right?

A. That is right.

Mr. Winter: If the Court please, we object [23] to the last part of that question. It is certainly leading and calling for a conclusion and trying to attempt to—the conclusion is one that this Court must arrive at.

Mr. Simon: Again——

Mr. Winter: And that is whether or not he paid to himself, and further that it is certainly leading and suggestive and it is testifying for the witness.

The Court: Well, of course, it is leading, but I

(Testimony of Justin M. Martin.)
think in a case of this character it may facilitate the answer and the witness may answer.

A. That is right.

Mr. Simon: That is all.

Recross-Examination

By Mr. Winter:

Q. Well, it wasn't until after you talked to the agent about the estate tax return in any event that you made any correction in the entries in the books?

A. Well, that is true; that is a statement of fact.

Q. Yes. A. That is true. [24]

Q. And when you say, as counsel said to you, when you say that Mr. Merrill paid to himself—Mr. Merrill was the executor of the estate, wasn't he?

A. That is right.

Q. And on the executory of the estate he drew a check as executor payable to himself individually?

A. That is correct.

Q. And deposited it in his own individual account? A. That is correct.

Q. He had a separate account from the estate?

A. Right.

Mr. Winter: That is all.

Mr. Simon: One further question.

Re-re-redirect Examination

By Mr. Simon:

Q. The funds in that estate account, to which counsel has just referred, were the property of Mrs.

(Testimony of Justin M. Martin.)

Beulah Lee Merrill and represented her half of the community property, do they not?

A. Represented a portion perhaps, but there were other assets in addition which were also part of her half of the community property. [25]

Q. But none of Mr. Merrill's half of the community was in that bank account?

A. That is right.

Further Recross-Examination

By Mr. Winter:

Q. Then if it was all her property paid to Mr. Merrill, it was none of his paid to him in the check; is that right?

A. That is right; that is right.

Q. And then you don't say that he paid to himself then, do you?

A. (Witness laughs.)

Q. Do you?

A. Well, that expression can be—I think it can be interpreted two (2) ways.

Q. You can interpret it two (2) ways?

A. Yes.

Mr. Winter: That is all.

Mr. Simon: I think all we get by that answer is that Mr. Merrill was both the executor and the individual recipient.

The Court: Is that all?

Mr. Simon: I have nothing further with this witness.

(Witness excused.) [26]

Mr. Simon: That is our case, your Honor.

Mr. Winter: We have no testimony, your Honor.

(Whereupon, at 10:50 o'clock, a.m., October 16, 1951, hearing was adjourned.)

Certificate

I, Earl V. Halvorson, official court reporter for the within-entitled court, hereby certify that the foregoing is a full, true and correct transcript of matters therein set forth, and any omissions in the proceedings had on the date herein set forth have been parenthetically noted.

/s/ EARL V. HALVORSON.

[Endorsed]: Filed June 16, 1952. [27]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith all of the original papers in the file dealing with the above-

entitled action, excluding exhibits, and that said papers constitute the record on appeal from that certain judgment, findings and conclusions filed in the above-entitled cause on February 18, 1952, to the United States Court of Appeals for the Ninth Circuit, said papers being identified as follows:

1. Complaint, filed Nov. 18, 1949.
2. Marshal's Return on Summons, filed Nov. 21, 1949.
3. Appearance of Defendant, filed Jan. 18, 1950.
4. Stipulation extending time to answer to 2/15/50, filed 1/21/50.
5. Stipulation extending time to answer to 4/15/50, filed 3/23/50.
6. Answer, filed May 19, 1950.
7. Stipulation for Vacation of Setting, filed Feb. 1, 1951.
8. Stipulation for Vacation of Setting, filed June 6, 1951, and order vacating setting (endorsed thereon).
9. Plaintiff's Trial Memorandum, filed Oct. 16, 1951.
10. Defendant's Contentions, filed Oct. 16, 1951.
11. Stipulation Concerning Facts, filed Oct. 16, 1951.
12. Stipulation re filing memorandum of authorities, filed Dec. 21, 1951.
13. Brief for the United States, filed Jan. 11, 1952.
14. Plaintiff's Reply Brief, filed Feb. 1, 1952.
15. Notice of Presentation, filed Feb. 18, 1952.

16. Findings of Fact and Conclusions of Law, filed Feb. 18, 1952.

17. Judgment, filed Feb. 18, 1952.

18. Court Reporter's Transcript of Court's Oral Decision, filed 3/13/52.

19. Notice of Appeal, filed April 16, 1952.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of the appellant for preparation of the record on appeal herein, to wit:

Notice of Appeal, $5.00.

and that said amount has not been paid to me by attorneys for the Appellant because the appeal is being prosecuted by the Unitied States of America.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 19th day of May, 1952.

[Seal] MILLARD P. THOMAS,
Clerk.

By /s/ TRUMAN EGGER,
Chief Deputy.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT, TO SUPPLEMENTAL RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith supplemental to the record on appeal in the above-entitled cause the following additional paper filed in my office subsequent to transmission of the record, to wit:

20. Order Extending time ninety days, to wit: to July 15, 1952, for filing record on appeal, filed May 20, 1952.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 28th day of May, 1952.

[Seal] MILLARD P. THOMAS,
Clerk.

By /s/ TRUMAN EGGER,
Chief Deputy.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO SUPPLEMENTAL RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith, supplemental to the record on appeal in the above-entitled cause, the following additional papers filed in my office subsequent to transmission of the record, together with Exhibits A to I, inclusive:

21. Appellant's Designation of Contents of Record on Appeal, filed June 9, 1952.

22. Order for transmission of original exhibits, filed June 9, 1952.

23. Court Reporter's Transcript of Testimony of Justin M. Martin, filed June 16, 1952.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 9th day of July, 1952.

[Seal] MILLARD P. THOMAS,
Clerk.

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 13390. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. R. D. Merrill, Appellee. Transcript of Record and Supplemental Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Transcript of Record filed May 21, 1952.

Supplemental Transcript of Record filed July 11, 1952.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13390

UNITED STATES OF AMERICA,
Appellant,

vs.

R. D. MERRILL,
Appellee.

APPELLANT'S STATEMENT OF THE POINTS ON WHICH IT INTENDS TO RELY ON THE APPEAL

The appellant intends to rely on the following points:

1. The trial court erred in ruling that there is justly due and owing to the appellee from the appellant upon the First Cause of Action the sum of $525 together with interest.

2. The trial court erred in ruling that there is justly due and owing to appellee by appellant on account of the Second Cause of Action the sum of $3,927.02 together with interest.

3. The trial court erred in ruling that the appellee was entitled to judgment in accordance with the above rulings and to his costs.

4. The trial court erred in filing an order for judgment in accordance with the above rulings.

5 The trial court erred in finding that there was

an over-statement of the appellee's net income for the year 1939 as set forth in his claim for refund.

6. The trial court erred in finding that the disallowance of the appellee's claim for refund was erroneous and that the appellee had paid excessive and illegal income taxes for the year 1939 for the reason that $2,500 of the amount received by him was an advance from the estate.

7. The trial court erred in finding that the appellee erroneously reported for 1939 the full sum of $12,500 as income whereas $2,500 did not constitute income to him as it was merely an advance.

8. The trial court erred in finding that under the law of the State of Washington the estate of a deceased spouse pays and is charged with only one-half of the administrative expenses, including executor's fees, the other half being chargeable against the share of the surviving spouse and that where, as here, the surviving spouse is the executor, no income accrues to the executor by the transfer to himself of his own funds.

9. The trial court erred in finding that the sum of $2,500 was erroneously included as income to the appellee for 1939 resulting in his paying an excessive tax for that year in the amount of $525.

10. The trial court erred in finding that there was an erroneous over-statement of the appellee's net income for the year 1940.

11. The trial court erred in finding that the sum

of $7,500 received by the appellee in 1940 was not income to him but was an advance.

12. The trial court erred in applying to the Second Cause of Action its erroneous finding referred to in point 8, supra.

13. The trial court erred in ruling in its oral decision that the $10,000 here involved was mistakenly reported as income.

14. The trial court erred in ruling in its oral decision that the $10,000 here involved was not income under the laws and decisions of the State of Washington.

15. The trial court erred in failing to rule that the $10,000 here involved constituted income to the appellee under the Federal tax laws.

16. The trial court erred in failing to rule that the appellant was entitled to judgment with costs.

17. If the trial court correctly ruled that the appellee was only taxable on $10,000 of the fee it erred in ruling that all of such amount was received in 1939 and in failing to find that $6,250 of such amount was received in 1939 and $3,750 in 1940, and in failing to rule accordingly.

. . . . . .

ELLIS N. SLACK,
Acting Asst. Attorney General,
Attorney for Appellant.

Proof of Service attached.

[Endorsed]: Filed June 30, 1952.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF THE MATERIAL PORTIONS OF THE RECORD

The appellant hereby designates the entire record as material to the consideration of the appeal.

/s/ ELLIS N. SLACK,
Acting Asst. Attorney General,
Attorney for Appellant.

Proof of Service attached.

[Endorsed]: Filed June 30, 1952.